

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MARIE ANGELINE NASTASE,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

Case No. 3:14-cv-05275-KLS

ORDER REVERSING AND
REMANDING DEFENDANT'S
DECISION TO DENY BENEFITS

Plaintiff has brought this matter for judicial review of Defendant's denial of her applications for Disability Insurance and Supplemental Security Income ("SSI") benefits. Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. After reviewing the parties' briefs and the remaining record, the Court hereby finds that for the reasons set forth below, Defendant's decision to deny benefits should be reversed and this matter should be remanded for further administrative proceedings.

FACTUAL AND PROCEDURAL HISTORY

On December 3, 2010, Plaintiff filed an application for Disability Insurance Benefits and another one for Supplemental Security Income, alleging in both applications that she became disabled beginning October 1, 2010. *See* ECF #8, Administrative Record ("AR") 186-196. Both applications were denied upon initial administrative review on July 14, 2011 and on reconsideration on September 15, 2011. *See* AR 144-149. A hearing was held before an

1 administrative law judge (“ALJ”) on September 19, 2012, at which Plaintiff, represented by
2 counsel, appeared and testified, as did a vocational expert. *See* AR 10.

3 In a decision dated October 25, 2012, the ALJ determined Plaintiff to be not disabled. *See*
4 AR 10-27. Plaintiff’s request for review of the ALJ’s decision was denied by the Appeals
5 Council on February 21, 2014, making that decision the final decision of the Commissioner of
6 Social Security (the “Commissioner”). *See* AR 1-3; 20 C.F.R. § 404.981, § 416.1481. On April
7 3, 2014, Plaintiff filed a complaint in this Court seeking judicial review of the Commissioner’s
8 final decision. *See* ECF #1. The administrative record was filed with the Court on June 13, 2014.
9 *See* ECF #8. The parties have completed their briefing, and thus this matter is now ripe for the
10 Court’s review.
11

12 Plaintiff argues Defendant’s decision to deny benefits should be reversed and remanded
13 for an award of benefits, because the ALJ erred: (1) in finding that drug and/or alcohol abuse
14 were material to the determination of disability, and (2) in rejecting the medical opinions of
15 David Widlan, Ph.D. For the reasons set forth below, the Court agrees that the ALJ erred as
16 alleged, and therefore in determining Plaintiff to be not disabled. However, for the reasons set
17 forth below, the Court finds that while Defendant’s decision to deny benefits should be reversed
18 on this basis, this matter should be remanded for further administrative proceedings.
19

20 DISCUSSION

21 The determination of the Commissioner that a claimant is not disabled must be upheld by
22 the Court, if the “proper legal standards” have been applied by the Commissioner, and the
23 “substantial evidence in the record as a whole supports” that determination. *Hoffman v. Heckler*,
24 785 F.2d 1423, 1425 (9th Cir. 1986); *see also Batson v. Commissioner of Social Security Admin.*,
25 359 F.3d 1190, 1193 (9th Cir. 2004); *Carr v. Sullivan*, 772 F.Supp. 522, 525 (E.D. Wash. 1991)
26

1 (“A decision supported by substantial evidence will, nevertheless, be set aside if the proper legal
 2 standards were not applied in weighing the evidence and making the decision.”) (citing *Browner*
 3 *v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1987)).

4 Substantial evidence is “such relevant evidence as a reasonable mind might accept as
 5 adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citation
 6 omitted); *see also Batson*, 359 F.3d at 1193 (“[T]he Commissioner’s findings are upheld if
 7 supported by inferences reasonably drawn from the record.”). “The substantial evidence test
 8 requires that the reviewing court determine” whether the Commissioner’s decision is “supported
 9 by more than a scintilla of evidence, although less than a preponderance of the evidence is
 10 required.” *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). “If the evidence
 11 admits of more than one rational interpretation,” the Commissioner’s decision must be upheld.
 12 *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984) (“Where there is conflicting evidence
 13 sufficient to support either outcome, we must affirm the decision actually made.”) (quoting
 14 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971)).¹

17 I. The ALJ’s Evaluation of the Medical Evidence in the Record

18 The ALJ is responsible for determining credibility and resolving ambiguities and
 19 conflicts in the medical evidence. *See Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998).

20 Where the medical evidence in the record is not conclusive, “questions of credibility and
 21

22 ¹ As the Ninth Circuit has further explained:

23 . . . It is immaterial that the evidence in a case would permit a different conclusion than that
 24 which the [Commissioner] reached. If the [Commissioner]’s findings are supported by
 25 substantial evidence, the courts are required to accept them. It is the function of the
 26 [Commissioner], and not the court’s to resolve conflicts in the evidence. While the court may
 not try the case de novo, neither may it abdicate its traditional function of review. It must
 scrutinize the record as a whole to determine whether the [Commissioner]’s conclusions are
 rational. If they are . . . they must be upheld.

Sorenson, 514 F.2d at 1119 n.10.

1 resolution of conflicts” are solely the functions of the ALJ. *Sample v. Schweiker*, 694 F.2d 639,
2 642 (9th Cir. 1982). In such cases, “the ALJ’s conclusion must be upheld.” *Morgan v.*
3 *Commissioner of the Social Sec. Admin.*, 169 F.3d 595, 601 (9th Cir. 1999). Determining
4 whether inconsistencies in the medical evidence “are material (or are in fact inconsistencies at
5 all) and whether certain factors are relevant to discount” the opinions of medical experts “falls
6 within this responsibility.” *Id.* at 603.

7
8 In resolving questions of credibility and conflicts in the evidence, an ALJ’s findings
9 “must be supported by specific, cogent reasons.” *Reddick*, 157 F.3d at 725. The ALJ can do this
10 “by setting out a detailed and thorough summary of the facts and conflicting clinical evidence,
11 stating his interpretation thereof, and making findings.” *Id.* The ALJ also may draw inferences
12 “logically flowing from the evidence.” *Sample*, 694 F.2d at 642. Further, the Court itself may
13 draw “specific and legitimate inferences from the ALJ’s opinion.” *Magallanes v. Bowen*, 881
14 F.2d 747, 755, (9th Cir. 1989).

15
16 The ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted
17 opinion of either a treating or examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
18 1996). Even when a treating or examining physician’s opinion is contradicted, that opinion “can
19 only be rejected for specific and legitimate reasons that are supported by substantial evidence in
20 the record.” *Id.* at 830-31. However, the ALJ “need not discuss *all* evidence presented” to him
21 or her. *Vincent on Behalf of Vincent v. Heckler*, 739 F.3d 1393, 1394-95 (9th Cir. 1984) (citation
22 omitted) (emphasis in original). The ALJ must only explain why “significant probative evidence
23 has been rejected.” *Id.*; *see also Cotter v. Harris*, 642 F.2d 700, 706-07 (3rd Cir. 1981); *Garfield*
24 *v. Schweiker*, 732 F.2d 605, 610 (7th Cir. 1984).

25
26 In general, more weight is given to a treating physician’s opinion than to the opinions of

those who do not treat the claimant. *See Lester*, 81 F.3d at 830. On the other hand, an ALJ need not accept the opinion of a treating physician, “if that opinion is brief, conclusory, and inadequately supported by clinical findings” or “by the record as a whole.” *Batson v. Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004); *see also Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002); *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001). An examining physician’s opinion is “entitled to greater weight than the opinion of a nonexamining physician.” *Lester*, 81 F.3d at 830-31. A non-examining physician’s opinion may constitute substantial evidence if “it is consistent with other independent evidence in the record.” *Id.* at 830-31; *Tonapetyan*, 242 F.3d at 1149.

A. Failure to Discuss Materiality of Drug and Alcohol Abuse in Context of State Agency Physician Reports

The Commissioner employs a five-step “sequential evaluation process” to determine whether a claimant is disabled. *See* 20 C.F.R. § 416.920. If the claimant is found disabled or not disabled at any particular step thereof, the disability determination is made at that step, and the sequential evaluation process ends. *See id.* A claimant may not be found disabled if alcoholism or drug addiction (“DAA”) would be “a contributing factor material to the Commissioner’s determination” that the claimant is disabled. *Bustamante v. Massanari*, 262 F.3d 949, 954 (9th Cir. 2001) (citing 42 U.S.C. §§ 423(d)(2)(C), 1382c(a)(3)(J)). The Social Security Regulations also require the Commissioner to determine if “drug addiction or alcoholism is a contributing factor material to the determination of disability.” *Id.* (citing 20 C.F.R. § 416.935(a)).

Plaintiff contends, and the Court agrees, that the ALJ ignored the uncontroverted medical opinions of the state agency physicians that drug and/or alcohol abuse was involved, but not material. In fact, Defendant concedes that the ALJ failed to discuss the State agency physicians’ opinions regarding materiality, but argues that it is harmless error. *See* ECF #12 at 5.

1 The ALJ determined that drugs and/or alcohol are material in that substance abuse
2 exacerbates the Plaintiff's mental impairments. *See* AR 17. The only medical evidence in the
3 record to actually include a determination of materiality was the reports of the State agency
4 physicians. No other report in the record indicated that drugs and/or alcohol abuse were
5 material, or not. While the ALJ may pick and choose to which opinions she refers, she cannot
6 create her own medical opinion. *See Gonzalez Perez v. Secretary of Health and Human*
7 *Services*, 812 F.2d 747, 749 (1st Cir. 1987) (ALJ may not substitute own opinion for findings
8 and opinion of physician); *McBrayer v. Secretary of Health and Human Services*, 712 F.2d 795,
9 799 (2nd Cir. 1983) (ALJ cannot arbitrarily substitute own judgment for competent medical
10 opinion). The ALJ is free to merely choose "between properly submitted medical opinions."
11 *Gober*, 574 F.2d at 777. Both reports of the State agency physicians found that "DAA is
12 involved, but is NOT material." *See* AR 97, 110, 142. The ALJ gives "great weight" to the state
13 agency physicians' reports "because they are generally consistent with the overall record." *See*
14 AR 26. However, despite the great weight accorded to them, the ALJ does not discuss the state
15 agency physicians' uncontroverted opinions that drugs and/or alcohol abuse are involved but not
16 material.
17
18

19 Although Defendant argues that the ALJ's failure to discuss the State agency physicians'
20 opinions regarding materiality is harmless error, the Court disagrees. The Ninth Circuit has
21 "recognized that harmless error principles apply in the Social Security Act context." *Molina v.*
22 *Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) (*citing Stout v. Commissioner, Social Security*
23 *Administration*, 454 F.3d 1050, 1054 (9th Cir. 2006) (collecting cases)). The Court noted
24 multiple instances of the application of these principles. *Id.* (collecting cases). The Court noted
25 that "several of our cases have held that an ALJ's error was harmless where the ALJ provided
26

1 one or more invalid reasons for disbelieving a claimant's testimony, but also provided valid
2 reasons that were supported by the record." *Id.* (citations omitted). The Ninth Circuit noted that
3 "in each case we look at the record as a whole to determine [if] the error alters the outcome of
4 the case." *Id.* The Court also noted that the Ninth Circuit has "adhered to the general principle
5 that an ALJ's error is harmless where it is 'inconsequential to the ultimate nondisability
6 determination.'" *Id.* (quoting *Carmickle v. Comm'r Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th
7 Cir. 2008)) (other citations omitted). The Court noted the necessity to follow the rule that courts
8 must review cases "'without regard to errors' that do not affect the parties' 'substantial rights.'" *Id.*
9 at 1118 (quoting *Shinsheki v. Sanders*, 556 U.S. 396, 407 (2009) (quoting 28 U.S.C. § 2111)
10 (codification of the harmless error rule)).
11

12 Defendant argues that the ALJ's error in not discussing the State agency physician's
13 findings that drug and/or alcohol abuse were not material was harmless as "the ultimate
14 conclusion would have been the same (i.e. Plaintiff is not disabled). The reason for this is that
15 each of the reviewers noted by Plaintiff opined she was not disabled from any of her
16 impairments, including her drug and alcohol impairments." See ECF #12 at 5. However, the
17 ALJ found that the Plaintiff was disabled when using drugs and/or alcohol. See AR 17. Had the
18 State agency physicians' opinions regarding materiality been given the same weight as the rest of
19 their opinions, the disability determination may very well have changed. Thus the error was not
20 harmless.
21

22
23 B. Rejection of Dr. David Widlan's Medical Opinion

24 Plaintiff further contends that the ALJ erred in rejecting the medical opinion of David
25 Widlan, Ph.D. The ALJ gave little weight to Dr. Widlan's opinion, finding that "Dr. Widlan
26 based his opinion, at least in part, on the claimant's subjective reports, and the claimant is not

1 fully credible.” *See* AR 25. The ALJ also found his opinion to be “inconsistent with his
2 examination findings.” *Id.* Finally, the ALJ found that the overall record indicated “greater
3 functioning, including evidence of controlled pain and psychotic symptoms on medication,
4 regular participation in group exercise, and shopping at IKEA.” *Id.*

5 According to the Ninth Circuit, “[an] ALJ may reject a treating physician’s opinion if it is
6 based ‘to a large extent’ on claimant self-reports that have been properly discounted as
7 incredible.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (*quoting Morgan v.*
8 *Comm’r. Soc. Sec. Admin.*, 169 F.3d 595, 602 (9th Cir. 1999) (*citing Fair v. Bowen*, 885 F.2d
9 597, 605 (9th Cir. 1989)). This situation is distinguishable from one in which the doctor provides
10 his own observations in support of his assessments and opinions. *See Ryan v. Comm’r of Soc.*
11 *Sec. Admin.*, 528 F.3d 1194, 1199-1200 (9th Cir. 2008) (“an ALJ does not provide clear and
12 convincing reasons for rejecting an examining physician’s opinion by questioning the credibility
13 of the patient’s complaints where the doctor does not discredit those complaints and supports his
14 ultimate opinion with his own observations”); *see also Edlund v. Massanari*, 253 F.3d 1152,
15 1159 (9th Cir. 2001).

16 Dr. Widlan’s report is from a consultative examination that he conducted on the Plaintiff.
17 While it is true that his report is based in part on the Plaintiff’s self-report, it also contains a
18 discussion of his clinical observations of the Plaintiff at the time of the examination. Based on
19 his examination of the Plaintiff, which included a mental status examination, Dr. Widlan’s
20 observations included the following:

21 Marie’s behavior was quite noteworthy...She appeared to have significant deficits in
22 insight...She was tangential during the assessment and had trouble pinpointing
23 information. A passive observer would not necessarily observe any mental health issues
24 though once conversing with her it becomes obvious she is quite impaired. She became
25 quite distracted during the Serial 3’s task. She was unable to repeat any objects after a
26 five-minute lapse.

1 Marie struggled to articulate her mood...Her affect was restricted and generally
2 congruent with her mood; however, on several occasions she laughed in a strange manner
3 that was inconsistent with the information she was describing.

4 Marie struggled to follow the clinical interview at times and presented as a questionable
5 informant, not due to memory issues but due to the significance of psychosis. She was
6 highly tangential though not incoherent.

7 Marie struggled to identify specific time periods for life events. She was not able to
8 remember any objects (out of three) after a five-minute lapse.

9 Marie appeared to have significant deficits in insight regarding her emotional functioning
10 as previously described, particular regarding paranoia.

11 Marie struggled to complete serial counting tasks. On the Serial 3's counting task
12 (counting backward from 100) she initially responded "7, 4." After this examiner
13 prompted "Count back from 100" she stated "97, 94, 93? No, wait, 97, 94, where was
14 I? 97, 93, 90. Did I say that wrong?" After an additional prompt she stated "87."

15 Marie exhibited significant concentration deficits that were evident during both the MSE
16 and the clinical interview. She struggled to maintain focus at times and responded with
17 slow pace. She clearly takes considerably longer than an average functioning individual
18 to complete ADL's due to psychosis.

19 *See* AR429-431.

20 Dr. Widlan's conclusion states:

21 While she is cognitively able to accept instruction from a supervisor for simple, repetitive
22 tasks perhaps, she clearly has severe adaptive deficits secondary to psychosis and
23 exacerbated by agoraphobia. These issues would impact all aspects of her functioning in
24 an employment setting.

25 *See* AR 432.

26 While Dr. Widlan's opinion, like all psychological evaluations, is based in part on
Plaintiff's subjective statements, it is clear that Dr. Widlan's opinion was based on other
objective criteria including a mental status examination and clinical observations. Thus, this was
not a legally sufficient reason to discredit Dr. Widlan's opinion.

1 The ALJ also found that Dr. Widlan's opinion is inconsistent with his examination
2 findings. As evidence of this alleged inconsistency, the ALJ pointed to the fact that the Plaintiff
3 could complete a three-step task, take trips out of her home, and complete several simple daily
4 tasks. *See* AR 25. However, substantial evidence does not support the ALJ's findings regarding
5 these activities. For example, while the record shows Plaintiff planned to participate in group
6 exercise classes, there is no indication that she actually attended these class or that she did so on
7 a regular basis. *See* AR 442, 445. Further, while shopping may show a high level of social
8 functioning ability, the record shows Plaintiff went to IKEA on merely one occasion. *See* AR
9 674. These limited activities are not inconsistent with Dr. Widlan's opinion and are not a
10 sufficient reason to discredit the opinion.
11

12 Further, in addition to his consultative examination, Dr. Widlan reviewed hospitalization
13 records from St. Francis and records from Seattle Indian Health Board. *See* AR 427. Those
14 records contain Plaintiff's history, based on self-report, in which it is noted that she is able to
15 complete simple daily tasks and has taken trips outside her home. Dr. Widlan's own report
16 contains references to Plaintiff's ability to complete simple daily tasks and take trips outside her
17 home, including the one Plaintiff took to attend the consultative examination. Therefore,
18 presumably Dr. Widlan was aware of these facts when making his conclusions, and did not find
19 these limited activities to be inconsistent with his opinion.
20

21 As an examining physician, Dr. Widlan's report is "entitled to greater weight than the
22 opinion of a nonexamining physician." *Lester, supra*, 81 F.3d at 830 (citations omitted); *see also*
23 20 C.F.R. § 404.1527(c)(1) ("Generally, we give more weight to the opinion of a source who has
24 examined you than to the opinion of a source who has not examined you"). Dr. Widlan based
25 his report on his own observations at the time of the consultative examination, as well as his
26

1 review of other medical records and the Plaintiff's self-report. Dr. Widlan's report takes the
2 alleged inconsistencies into account and does not discredit Plaintiff's complaints, supporting his
3 ultimate opinion with his own observations. Therefore, the ALJ erred in rejecting Dr. Widlan's
4 report.

5 II. This Matter Should Be Remanded for Further Administrative Proceedings

6 The Court may remand this case "either for additional evidence and findings or to award
7 benefits." *Smolen*, 80 F.3d at 1292. Generally, when the Court reverses an ALJ's decision, "the
8 proper course, except in rare circumstances, is to remand to the agency for additional
9 investigation or explanation." *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations
10 omitted). Thus, it is "the unusual case in which it is clear from the record that the claimant is
11 unable to perform gainful employment in the national economy," that "remand for an immediate
12 award of benefits is appropriate." *Id.*

13 Benefits may be awarded where "the record has been fully developed" and "further
14 administrative proceedings would serve no useful purpose." *Smolen*, 80 F.3d at 1292; *Holohan v.*
15 *Massanari*, 246 F.3d 1195, 1210 (9th Cir. 2001). Specifically, benefits should be awarded
16 where:

17 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the
18 claimant's] evidence, (2) there are no outstanding issues that must be resolved
19 before a determination of disability can be made, and (3) it is clear from the
20 record that the ALJ would be required to find the claimant disabled were such
21 evidence credited.

22 *Smolen*, 80 F.3d 1273 at 1292; *McCartey v. Massanari*, 298 F.3d 1072, 1076-77 (9th Cir. 2002).

23 Because issues remain as to the materiality of drugs and/or alcohol abuse as well as the
24 assessment of Dr. Widlan's medical opinion, remand for further consideration of those issues is
25 warranted.
26

CONCLUSION

Based on the foregoing discussion, the Court hereby finds the ALJ improperly concluded Plaintiff was not disabled. Accordingly, Defendant's decision to deny benefits is REVERSED and this matter is REMANDED for further administrative proceedings in accordance with the findings contained herein.

DATED this 30th day of October, 2014.



Karen L. Strombom
States Magistrate Judge

United